

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB BPRS 13-03 Homeowners' Associations
SPONSOR(S): Business & Professional Regulation Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Business & Professional Regulation Subcommittee	13 Y, 0 N	Morton	Luczynski

SUMMARY ANALYSIS

No state agency has direct oversight of homeowners' associations. Florida law provides procedures and minimum requirements for operating homeowners' associations and provides for a mandatory arbitration program, operated by the Department of Business and Professional Regulation (DBPR), for certain election disputes.

The bill requires community association managers, or a director of the association, to report specified information to the DBPR, which is directed to make a report of the data to the Governor and Legislature. The bill would also amend statutory requirements for homeowners' associations. Many of these changes conform to existing laws governing condominium associations.

As to homeowner access to official records of the association, the bill provides:

- Records must be maintained for seven years.
- Records must be maintained within 45 miles of the community, or within the same county.
- The association may maintain records electronically.
- Failure to permit inspection entitles the homeowner to recover reasonable attorneys' fees from the person in control of the documents in an enforcement action.

As to officers and directors of homeowners' associations, the bill provides:

- Newly elected directors must certify they have read, and will uphold, the governing documents.
- Agreements with interested directors must follow disclosure procedures, be approved by two-thirds vote of the board, and may be cancelled by vote of the members.
- Officers and directors may not solicit or accept things of value from anyone providing or offering to provide services to the association, with exceptions. Violations result in removal from the board.
- Officers or directors charged with theft or embezzlement of association funds must be removed from the board.
- Associations with annual budgets in excess of \$500,000 must maintain insurance or fidelity bonding.

As to developer control of homeowners' associations, the bill provides:

- Additional events that trigger turnover, including when the developer has: ceased constructing or selling parcels for two years, abandoned the association, filed chapter 7 bankruptcy, lost title through foreclosure or, in certain cases, when a receiver has been appointed.
- Homeowners may elect at least one member to the board once 15 percent of parcels are conveyed.
- Association document provisions providing the developer the ability to increase homeowners' liabilities or decrease homeowners' rights to amenities or common areas after 70 percent of parcels have been conveyed are unenforceable.

The bill also repeals mandatory presuit mediation and requires associations to adopt internal dispute resolution procedures.

The bill provides an effective date of July 1, 2013, and is not expected to have a fiscal impact to state funds.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Regulation of Homeowners' Associations

No state agency has direct oversight of homeowners' associations. Florida law provides procedures and minimum requirements for operating homeowners' associations and provides for a mandatory binding arbitration program, administered by the DBPR, for certain election disputes.

A "homeowners' association" is defined by statute as a "Florida corporation responsible for the operation of a community or a mobile home subdivision in which the voting membership is made up of parcel owners or their agents, or a combination thereof, in which membership is a mandatory condition of parcel ownership, and which is authorized to impose assessments that, if unpaid, may become a lien on the parcel."

Unless specifically stated to the contrary, homeowners' associations are also governed by ch. 607, F.S., relating to for-profit corporations or by ch. 617, F.S., relating to not-for-profit corporations.

Homeowners' associations are administered by a board of directors whose members are elected. The powers and duties of homeowners' associations include the powers and duties provided in ch. 720, F.S., and in the governing documents of the association, which include recorded declaration of covenants, bylaws, articles of incorporation, and duly adopted amendments to these documents. The officers and members of a homeowners' association have a fiduciary relationship to the members who are served by the association.

Current Situation

State regulation of homeowners' associations is very limited. The only area where the Department of Business and Professional Regulation (DBPR) has responsibility is related to election disputes. Any such dispute between a member and an association must be submitted to mandatory binding arbitration with the Division of Condominiums, Timeshares, and Mobile Homes (Division).

Proposed Changes

The bill does not directly create any new regulatory responsibilities for the DBPR; however, the bill requires the DBPR to create a mechanism for mandatory homeowners' to report basic information about their existence and holds licensed community association managers accountable for violations of ch. 720, F.S., related to the performance of their duties as a community manager for a homeowners' association. These issues are discussed under "Community Association Managers" below.

Official Records Access

Current Situation

Current law requires homeowners' associations to maintain the official records of the association. These records are open to inspection by any association member or authorized representative at any time. The right to inspection includes the right to copies at the reasonable expense of the member.

Current law requires certain records be kept for 7 years and requires that records be maintained available at reasonable times and places. Associations may charge fees to cover the costs of providing copies, including the costs of copying. Copies may cost up to 50 cents per page. For copies exceeding 25 pages, the association may use an outside vendor community association management company and charge any reasonable costs involving personnel fees and charges.

Effect of Proposed Changes

The bill conforms official records requirements for homeowners' associations to those requirements for condominium associations, including specifying that:

- Records must be maintained for 7 years.
- Records must be maintained within 45 miles of the community or within the same county.
- The association may maintain records electronically.
- Failure to permit inspection entitles the member to recover reasonable attorneys' fees from the person in control of the documents in an enforcement action.

The bill also requires the association to allow members to photograph records using a camera or other electronic device at no charge. The bill removes the provisions allowing charges for personnel costs.

Officers and Directors

Current Situation

As with the officers and directors of condominium associations, the officers and directors of a homeowners' association have a fiduciary relationship to the members who are served by the association. However, unlike the officers and directors of a condominium association, the officers and directors of homeowners' associations are not also subject to the following requirements:

- Directors of condominium associations must certify in writing that they have read the associations' governing documents and written policies, that they will uphold the documents and policies and maintain fiduciary responsibility to the association's members.
- For contracts or transactions between condominium associations and one of its directors or any other entity in which a director has a financial interest, the condominium association must comply with certain statutory conflict of interest procedures, including disclosure and approval requirements and the ability of members to cancel the contract.
- An officer, director or manager may not solicit or accept anything of value from any person providing or proposing to provide goods or services to the association. Knowingly doing so subjects the officer, director or manager to civil penalties.
- Officers and directors of condominium associations who are charged with felony theft or embezzlement involving the association funds or property must be removed from office.
- All condominium associations must maintain insurance or fidelity bonding on anyone who controls or disburses funds of the association.

Proposed Changes

The bill conforms certification requirements of directors of homeowners' associations to that of directors of condominium associations.

Thus, newly elected directors will have to certify in writing, within 90 days, that they have read the association's governing documents and policies; that they will work to uphold the documents and policies and that they will faithfully discharge their fiduciary responsibility to the associations' members. A director who fails to comply is suspended from the board until he or she complies. The certification is retained for 5 years after the director's election.

Furthermore, for contracts between homeowners' associations and directors or entities in which a director has a financial interest, the association must:

- Comply with conflict of interest procedures outlined in s. 617.0832, F.S.
- Comply with disclosure requirements outlined in s. 617.0832, F.S.
- Approve the contract or transaction by 2/3 vote of the directors present.
- Disclose the contract at the next regular or special meeting.

Upon the motion of any member at the next regular or special meeting, the contract will be voted on and may be canceled by a majority vote of the members present. If the contract is canceled, the

association is only liable for the reasonable value of goods and services already provided and is not liable for any fee or damages connected to the cancellation.

The bill provides that officers, directors and managers may not solicit or accept anything of value from any person providing or offering to provide goods or services to the association. An officer, director or manager who does so must be removed from office. The bill includes an exception for accepting food to be consumed at a business meeting with a value of less than \$25 per individual or services or items in connection to trade fairs or education programs.

The bill also provides that officers or directors charged with felony theft or embezzlement involving association funds must be removed from office. If the charges are resolved without a finding of guilt, the director or officer shall be reinstated for any remainder of his or her term of office.

The bill requires homeowners' associations with annual budgets exceeding \$500,000, to maintain insurance or fidelity bonding for anyone who controls or disburses association funds.

Turnover of Association Control

Current Situation

Current law provides two scenarios in which parcel owners other than the developer are entitled to elect at least a majority of the members of the board of directors:

- Three months after 90 percent of the parcels that will be operated ultimately by the association have been conveyed to purchasers; or
- When such other percentage of the parcels has been conveyed to members, or such other date or event has occurred, as is set forth in the governing documents in order to comply with the requirements of any governmentally chartered entity with regard to the mortgage financing of parcels.

This is in contrast to condominium associations, where the law provides the following circumstances requiring transition of control to a condominium association:

- Three years after 50 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- Three months after 90 percent of the units that will be operated ultimately by the association have been conveyed to purchasers;
- When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business;
- When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business; When the developer files a petition seeking protection in bankruptcy;
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members; or
- Seven years after recordation of the declaration of condominium with some conditions.

Proposed Changes

The bill adds the following scenarios triggering transition of control of the board from the developer to nondeveloper parcel owners:

- Two years after the developer has ceased construction or ceased to offer parcels for sale in the ordinary course of business;
- When the developer has abandoned or deserted his or her responsibility to maintain and complete the advertised amenities or infrastructure. There is a rebuttable presumption that the developer has abandoned and deserted the property, if the developer has not engaged in construction or sale of properties or has paid nothing in assessments or guaranteed amounts under s. 720.308 for a period of more than 2 years.

- When the developer files a petition seeking protection in bankruptcy under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. chapter 7.
- When the developer loses title to the property either through a foreclosure action or the transfer of a deed in lieu of foreclosure.
- When a receiver for the developer is appointed by a circuit court and is not discharged within 30 days after such appointment, unless the court determines within 30 days after appointment of the receiver that transfer of control would be detrimental to the association or its members.

Furthermore, the bill provides that nondeveloper parcel owners are entitled to elect at least one member of the board of directors once 15 percent of the parcels in all phases of the community have been conveyed to members.

Prohibited Clauses in Association Documents

Current Situation

Current law does not prohibit a developer from including a clause in the homeowners' association documents to permit the developer to unilaterally make changes to the documents that increase liabilities of homeowners or limit the rights of homeowners to amenities or common areas anytime prior to the transition of control of the board from the developer to nondeveloper parcel owners.

Proposed Changes

The bill provides that provisions granting a developer the ability to make changes to the homeowners' association documents without a majority vote of nondeveloper members that increase liabilities of homeowners or limit the rights of homeowners to amenities or common areas after 70 percent of the parcels have been conveyed to members are unenforceable.

Dispute Resolution

Current Situation

Current law requires that certain disputes related to homeowners associations are subject to pre-suit mediation before a lawsuit can be filed. A party that fails to initiate the mediation procedure, or who fails to participate in the procedure, may not recover attorney's fees in any subsequent litigation regarding the dispute. Mediators must be certified as a circuit court civil mediator pursuant to the requirements established by the Florida Supreme Court. Additionally, the parties may employ attorneys in connection with the mediation.

For condominium associations, chapter 718, F.S., provides for mandatory nonbinding arbitration for certain disputes prior to the institution of court litigation. Unlike a member of a homeowners' association who may be required to prepay one half of the mediator's fees and potentially attorney's fees in order to initiate presuit mediation, a party to a condominium dispute only pays a \$50 filing fee with the petition for nonbinding arbitration. The condominium approach is possible because each condominium association which operates more than two units pays to the division an annual fee of \$4 for residential unit in condominium operated by the association.

Proposed Changes

The bill repeals the statutory pre-suit mediation procedure. This means parties to a dispute may directly initiate suit in a court of appropriate jurisdiction, many of which offer alternative dispute resolution programs, or avail themselves of the internal dispute resolution procedure as provided by the bill.

The bill also requires homeowners' associations to adopt fair, reasonable and expeditious internal dispute resolution procedures meeting the following criteria:

- The procedure must be in writing.
- A member of the association may not be charged a fee to participate in the procedure.

- The procedure may be initiated by either party to a dispute.
- Requests to initiate the procedure shall be in writing.
- The procedure must make use of prompt deadlines, and shall specify the maximum time for the association to respond to requests to initiate the procedure.
- If the procedure is initiated by a member, the association shall participate in the procedure.
- If the procedure is initiated by the association, the member may elect not to participate in the procedure.
- The procedure shall provide a means by which the parties may explain their positions.
- If the dispute is resolved other than by agreement of the parties, the member shall have the right to appeal to the association's board of directors.
- Whenever feasible, neutral third parties should be used to facilitate resolution.
- The procedure may not prevent the member from engaging an attorney or other representative.

If an association fails to adopt such an internal dispute resolution procedure, the bill provides a default procedure.

The bill provides that a resolution, which is not in conflict with the law or governing documents, shall bind the association and is judicially enforceable. A written agreement signed by the parties, which is not in conflict with the law or governing documents, shall bind the parties and is also judicially enforceable.

Community Association Managers

Current Situation

Chapter 468, Part VIII, F.S., establishes licensure requirements for community association managers. A community association manager or firm must be licensed if he or she serves as management for an association of more than 10 units or an association with a budget of \$100,000 or greater. Currently, there are 16,622 licensed community association managers. Community association managers are licensed by the Division of Professions with the DBPR. The profession is overseen by the Regulatory Council of Community Association Managers.

Community association managers are managers of homeowner and condominium associations, rented or leased housing units, buildings, or land (including rights-of-way). "Community Association Management" means any of the following practices requiring substantial specialized knowledge, judgment, and managerial skill when done for payment and when the association served contains more than 10 units or has an annual budget in excess of \$100,000:

- Controlling or disbursing funds of a community association;
- Preparing budgets or other financial documents for a community association;
- Assisting in the noticing or conduct of community association meetings; and
- Coordinating maintenance for the residential development and other day-to-day services involved with the operation of a community association.

Under Chapter 468, Part VIII, F.S., there are two types of licensure available: community association manager and community association management firm. Licenses are renewed biennially.

The Division of Professions investigates complaints and allegations of a violation of ch. 468, part VIII, chapter 455, or any rule adopted thereunder, filed against community association managers or firms and forwarded from other divisions under the DBPR.

The DBPR may impose the following administrative penalties against licensed community association managers:

- Denial of an application for licensure.
- Revocation or suspension of a license.
- Imposition of an administrative fine not to exceed \$5,000 for each count or separate offense.

- Issuance of a reprimand.
- Placement of the community association manager on probation for a period of time and subject to such conditions as the department specifies.
- Restriction of the authorized scope of practice by the community association manager.

The grounds for disciplinary action include the following:

- Violation of any provision of chapter 468, Part VIII, F.S., relating to community association managers.
- Committing acts of gross misconduct or gross negligence in connection with the profession.
- Contracting, on behalf of an association, with any entity in which the licensee has a financial interest that is not disclosed.
- Making misleading, deceptive, or fraudulent representations related to the licensee's profession.
- Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to a crime in any jurisdiction which relates to the practice of a licensee's profession.
- Failing to perform any statutory or legal obligation placed upon a licensee.
- Making deceptive, untrue, or fraudulent representations in or related to the practice of a profession or employing a trick or scheme in or related to the practice of a profession.
- Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities the licensee knows, or has reason to know, the licensee is not competent to perform.
- Delegating or contracting for the performance of professional responsibilities by a person when the licensee delegating or contracting for performance of such responsibilities knows, or has reason to know, such person is not qualified by training, experience, and authorization when required to perform them.
- Failing to report in writing to the board or, if there is no board, to the department within 30 days after the licensee is convicted or found guilty of, or entered a plea of nolo contendere or guilty to, regardless of adjudication, a crime in any jurisdiction. A licensee must report a conviction, finding of guilt, plea, or adjudication entered before the effective date of this paragraph within 30 days after the effective date of this paragraph.

Proposed Changes

The bill provides that the DBPR may take administrative action against a community association manager's license for violations of ch. 720, F.S., relating to homeowners' associations, that are committed during the course of performing community management services pursuant to a contract with an association.

The bill requires community association managers, or the president of the association if there is no manager, to report the following information to the Division annually:

1. The legal name of the association.
2. The Federal Employee Identification Number of the association.
3. The mailing and physical addresses of the association.
4. The number of parcels.
5. The total amount of revenues and expenses from the annual budget of the association.

For associations in which the developer retains control, the following additional information is required:

1. The legal name of the developer.
2. The mailing address of the developer.
3. The number of parcels the developer owns as of the date of reporting.

The bill provides an effective date of July 1, 2013.

B. SECTION DIRECTORY:

Section 1 amends s. 469.436, F.S., providing grounds for disciplinary actions against community association managers.

Section 2 amends s. 720.303, F.S., relating to official records and other requirements.

Section 3 creates s. 720.3033, F.S., relating to officers and directors.

Section 4 amends s. 720.307, F.S., relating to transfer of control of association.

Section 5 amends s. 720.3075, F.S., providing certain provisions in association documents are unenforceable.

Section 6 amends s. 720.311, F.S., providing for internal dispute resolution procedures; repealing presuit mediation.

Section 7 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill requires the DBPR collect and report data on homeowners' associations to the Governor and the Legislature. DBPR reports it can accomplish this within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill is not expected to have a fiscal impact on state funds.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.